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Supreme Court, U.S.
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No. (2) 07-324

In the Supreme Court of the United States

VICTOR MCKEEVER, PETITIONER

v.

WARDEN SCI-GRATERFORD, *ET AL.*, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VICTOR MCKEEVER,	:	CIVIL ACTION
Petitioner,	:	
v.	:	
DAVID DIGUGLIELMO, et al.,	:	NO. 04-3567
Respondent.	:	

REPORT AND RECOMMENDATION

Jacob P. Hart, M.J.

November 30, 2004

This is a counseled petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, on behalf of an individual currently incarcerated at the State Correctional Institution at Graterford, Pennsylvania. For the reasons that follow, I recommend that the petition be granted.

FACTS AND PROCEDURAL HISTORY:

On June 13, 1995, McKeever pleaded guilty in the Court of Common Pleas of Erie County to violations of Pennsylvania's Corrupt Organizations Act, ("PACOA"), dealing in proceeds of unlawful activity, six counts of delivery of a controlled substance, criminal conspiracy, and possession of a controlled substance.[1] He was

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[1] Ordinarily, this court would have recommended transferring the case to the Western District of Pennsylvania because McKeever was convicted in Erie County, which lies in the Western District. The statute, however, confers concurrent jurisdiction on the district wherein the conviction was obtained and the district wherein the petitioner is confined and allows the court to transfer the petition to the other jurisdiction "in the furtherance of justice." 28 U.S.C. § 2241(d). Since the District Attorney of Erie County is in

sentenced to 15 - 42 years' incarceration by the Honorable Stephanie Domitrovich. McKeever filed a timely appeal in the Superior Court, which his appointed counsel subsequently withdrew. The Superior Court dismissed the appeal on October 2, 1995.

Seven and a half years later, McKeever filed a petition pursuant to Pennsylvania's Post Conviction Relief Act, ("PCRA"), 42 Pa.C.S.A. §§ 9541-9551. The PCRA Court found that the petition was untimely and dismissed the petition for lack of jurisdiction on May 6, 2003. McKeever appealed to the Superior Court, claiming that the PCRA Court erred in dismissing the petition as time-barred because he was actually innocent of the crimes, he was abandoned by his counsel, and the trial court was without jurisdiction to impose the sentence. On February 20, 2004, the Superior Court affirmed the denial of PCRA relief, noting that McKeever failed to plead any of the statutory exceptions to the PCRA's timeliness requirements. Commonwealth v. McKeever, No. 1051 WDA 2003.

On July 28, 2004, McKeever filed this petition for habeas corpus. The bulk of his claims relate to the Pennsylvania Supreme Court's decision in Commonwealth v. Besch, 674 A.2d 655 (Pa. 1996), in which the Court concluded that Pennsylvania's Corrupt Organizations Act did not apply to individuals engaged in a wholly illegitimate enterprise or business. Like Besch, McKeever was engaged in a wholly illegitimate business, selling drugs. Since McKeever's actions did not vio-

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the best position to respond to the petition, we would ordinarily recommend transferring such a petition to the Western District. However, in this case, McKeever's counsel is located in the Eastern District, and the case upon which McKeever most heavily relies is from our District Court. Therefore, we conclude that the interests of justice are best served by consideration of this petition in the Eastern District.

late the Pennsylvania Corrupt Organizations Act, as it was written at the time, he contends that his conviction violates due process and the proscription against cruel and unusual punishment. McKeever also argues that the Court of Common Pleas of Erie County lacked jurisdiction over certain drug transactions that occurred in Allegheny County. Finally, McKeever argues that his direct appellate counsel was ineffective for abandoning him.

DISCUSSION:

Tolling of the Limitations Period

In response to the petition, the Attorney General argues that the petition is time-barred. The Petitioner contends that the habeas limitations period should be equitably tolled because he is innocent of the crime of which he was convicted. For the reasons that follow, we conclude that the limitations period should be tolled in the circumstances presented by McKeever's case. However, as will be explained the tolling applies only to one of McKeever's claims, and on that claim, we recommend that the writ be granted only to the extent that McKeever's conviction relating to the violation of PACOA be vacated and he be resentenced without consideration of the PACOA convictions.

The question for the court is whether actual innocence is an exception to § 2244's one year limitations period. Neither the Supreme Court nor the Third Circuit have addressed this issue. The Honorable James Giles, Chief Judge of our District Court, has found that, in limited circumstances, innocence or manifest injustice does provide a basis to excuse § 2244's limitations period. Stocker v. Warden, SCI Graterford, 2004 WL 603400 (E.D. Pa. Mar. 24, 2004).

In Judge Giles' case, like ours, the petitioner was convicted of violating PACOA prior to the decision in Besch. When presented with Stocker's Besch-based claim, the state courts found that his state filings were untimely.

Without any statutory or equitable tolling, the habeas petition would also be untimely. However, Judge Giles found that, under the circumstances of Stocker's case, the limitations period had to give way to "fundamental notions of justice and fairness." Stocker, at *5.

Throughout Judge Giles' opinion, he stresses that Stocker had no possible opportunity to timely bring his Besch claim. "Stocker was technically time-barred from raising the claim before the highest court rendered its decision that was made applicable to him." Stocker, at *5. Judge Giles pointed out that "constitutional concerns result where a diligent petitioner has *no opportunity* to receive a full and fair hearing on constitutional violations resulting in incarceration." Stocker, at *7.

In responding to McKeever's habeas petition, the Attorney General attempts to distinguish Stocker by focusing on Judge Giles' determination that Stocker had no possible opportunity to bring his Besch claim. In contrast, argues the Attorney General, McKeever could have brought a timely PCRA petition after the Besch decision.

> McKeever is not similarly situated to Stocker. McKeever was not foreclosed from timely asserting his "actual innocence" under *Besch*.... In sum, when *Besch* was announced, McKeever had ample time to file a petition for post conviction relief and raise the application of *Besch* to his conviction and sentence for corrupt organizations.... These circumstances stand in sharp contrast to "Stocker [who] was technically time-barred from raising the claim before the highest court rendered its decision that was made applicable to him." *Stocker*, 2004 WL 603400 *5 (E.D. Pa.) Stocker had no avenue of relief in the state courts by which he could have timely pursued *a Besch* claim. McKeever had an available route of relief which he ignored for a period of seven years.

Response, at 11-12.

We, like Judge Giles, disagree with the Attorney General's argument. At the time Besch was decided, McKeever (and Stocker) had two weeks to file a Besch based claim in the state courts before the Pennsylvania legislature amended PACOA to include illicit businesses. Thereafter, the Pennsylvania Superior Court concluded that the legislature's actions, in essence, overruled Besch Commonwealth v. Shaffer, 696 A.2d 179, 183 (Pa. Super. 1997) revs'd 734 A.2d 840 (Pa. 1999). It was not until the Pennsylvania Supreme Court reviewed the Shaffer decision that the state's highest court addressed the effect the statutory amendment had on the Besch decision. On July 21, 1999, the Pennsylvania Supreme Court made clear, for the first time, that the legislature's amendment applied only prospectively. Shaffer, 734 A.2d at 844. Thus, McKeever's (and Stocker's) Besch claim did not become ripe until July, 1999, when "the highest court rendered its decision that was made applicable to him." Stocker, at *5.

At that point, Stocker filed a PCRA petition, which was found to be untimely by the state courts. Stocker, at *2-*3. McKeever did not file for collateral relief until January of 2003, at which time the state courts found his petition untimely. Despite McKeever's delay in filing for state collateral relief, there is no reason to believe that McKeever was in any different a position than was Stocker. Had he filed a PCRA petition after the Pennsylvania Supreme Court's decision in Shaffer, his petition would also have been found to be untimely filed.[2] Thus, it is clear that

[2] The PCRA was amended on November 17, 1995, to include a one year statute of limitations, effective January 16, 1996. If a petitioner's conviction became final prior to the effective date, he would have one year to file a timely PCRA petition. Because the Pennsylvania courts found that none of the exceptions to the limitations period applied to the facts presented by Stocker, it is clear that any petition McKeever brought after January 16, 1997, would also have been considered untimely.

McKeever is in the same position as Stocker "[T]here was *no possible* opportunity for petitioner to `timely file' for relief following the Pennsylvania Supreme Court's declaration of the statute." Stocker, at *5. Thus, we believe, with respect to the Besch claim, § 2244's limitations period should be equitably tolled.[3]

Exhaustion and Default

As previously discussed, McKeever had no avenue in the state courts through which to present his Besch claim. Thus, the federal court should excuse the exhaustion requirement. See 28 U.S.C. § 2254(b)(1)(B)(i). Similarly, the federal court should excuse McKeever's procedural default.

> [I]f the final state court presented with a federal claim refuses to decide its merits based on an established state rule of law independent of the federal claim and adequate to support the refusal, federal habeas review is foreclosed unless there is cause and prejudice or a showing of innocence.

Sistrunk v. Vaughn, 96 F. 3d 666, 673 (3d Cir. 1996)(citing Coleman v. Thompson, 501 U.S. 722, 750 (1991).

It is clear that the cause for McKeever's default was the strict construction of the PCRA's statute of limitations, despite the fact that the "interpretation definitively recognizing the illegality of petitioner's imprisonment was not issued until 1999," Stocker, at * 14, after McKeever's time for timely filing a PCRA petition had already expired.

It is also clear that McKeever has suffered prejudice. He has been imprisoned for conduct that, at the time, did not violate PACOA. See Shaffer, 734 A.2d at 844. The

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[3] Since McKeever could have presented his other claims on direct appeal or in a timely filed PCRA petition, we find no reason to toll the limitations period with respect to the remaining claims.

Supreme Court has found that such imprisonment violates the Due Process Clause of the Fourteenth Amendment. See Fiore v. White, 531 U. S. 225, 228-29 (2001); Stocker, at *17.

McKeever is entitled to habeas relief on this claim. Although the Attorney General argues that elimination of the PACOA related sentences will not change the aggregate sentence, this is an issue for the state courts to address.

Based on the foregoing discussion, I make the following:

RECOMMENDATION

AND NOW, this 30th day of November 2004, IT IS RESPECTFULLY RECOMMENDED that the petition for writ of habeas corpus be GRANTED to the extent the Petitioner's PACOA related convictions be vacated and the Petitioner be resentenced.

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE